STATE OF MICHIGAN

COURT OF APPEALS

RANDIE GRIER,

Plaintiff-Appellant,

v

EXCLUSIVE REALTY, CHARLES MADY, JR., THOMAS CASEY, and Estate of CLEMENS MEIER, Deceased,

Defendants-Appellees.

UNPUBLISHED
May 12, 2005

No. 252819
Wayne Circuit Court
LC No. 02-218172-CK

Before: Gage, P.J., and Cavanagh and Griffin, JJ.

PER CURIAM.

Plaintiff appeals as of right, challenging the trial court's February 20, 2003, order granting defendants summary disposition under MCR 2.116(C)(10), but allowing plaintiff to amend his complaint to allege a claim of promissory estoppel, and the court's November 25, 2003, order dismissing plaintiff's action with prejudice for failure to comply with the court's discovery orders. We affirm.

This action involves real property located at 1940 E. Jefferson Avenue in the city of Detroit. The property was owned by the Estate of Clemens Meier (the "Estate") and was listed for sale by defendant Thomas Casey, the Personal Representative for the Estate, with defendant Exclusive Realty, of which defendant Charles Mady, Jr., is a principal. Plaintiff filed this action in 2002 alleging that he acquired an enforceable lease with an option to purchase the property in 1997. Defendants deny that plaintiff ever acquired an interest in the property.

Plaintiff previously brought a lawsuit against defendants Exclusive Realty and the Estate in 1999, similarly alleging that he obtained an enforceable lease with an option to purchase the property in 1997. The defendants in that action filed a motion for summary disposition, which was denied. The case was subsequently dismissed without prejudice because plaintiff failed to file his portion of the joint final pretrial statement. Plaintiff appealed the order of dismissal, but the appeal was dismissed by this Court because plaintiff failed to timely file a brief. *Grier v Exclusive Realty*, unpublished order of the Court of Appeals, entered May 15, 2002 (Docket No. 236809).

Two weeks after this Court dismissed plaintiff's appeal in the prior action, plaintiff commenced this action. Plaintiff now argues on appeal that, because the trial court denied the

defendants' motion for summary disposition in the 1999 lawsuit, collateral estoppel precluded defendants from prevailing on their motion for summary disposition in the present action. We disagree.

The applicability of collateral estoppel is a question of law to be reviewed de novo. *McMichael v McMichael*, 217 Mich App 723, 727; 552 NW2d 688 (1996). For collateral estoppel to apply, a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment. *Nummer v Dep't of Treasury*, 448 Mich 534, 542; 533 NW2d 250 (1995). It is well settled that an order denying summary disposition is not a final judgment. *American Eutectic Welding Alloys Sales Co v Grier*, 363 Mich 175, 183; 108 NW2d 831 (1961); *Indiana Ins Co v Auto-Owners Ins Co*, 260 Mich App 662, 671 n 8; 680 NW2d 466 (2004); *Goodrich v Moore*, 8 Mich App 725, 728; 155 NW2d 247 (1967). Furthermore, the prior action was dismissed without prejudice because plaintiff failed to file a pretrial statement. Thus, the issues in the prior case were not actually litigated and determined by a valid and final judgment. Therefore, the trial court properly concluded that collateral estoppel did not apply.

Plaintiff also argues that summary disposition was improper because there were questions of fact to be determined by a jury. We disagree.

This Court reviews a trial court's grant or denial of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support of a claim. The motion should be granted if the evidence demonstrates that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001).

The only question of fact argued by plaintiff is whether an "Addendum to Lease" document purportedly signed by defendant Casey was genuine. To raise a question of fact regarding a writing, there must be some evidence from which a jury could have inferred that the signature on the document was genuine. Here, defendant presented evidence indicating that the document was forged, and plaintiff did not come forward with evidence disputing defendant's evidence. On the basis of the evidence submitted, there was no reasonable probability "that the document is what it purports to be," and, therefore, summary disposition was properly granted. *Marlo Beauty Supply, Inc v Farmers Ins Group of Cos*, 227 Mich App 309, 322; 575 NW2d 324 (1998). Although plaintiff also argues that summary disposition was improper because defendants allegedly gave assurances that he had a lease with an option to purchase and allegedly gave him possession of the premises, the trial court permitted plaintiff to amend his complaint to raise these estoppel-based claims, which plaintiff did. The trial court did not thereafter grant summary disposition of these claims, but rather dismissed them after plaintiff failed to comply with the court's orders. With regard to the claims for which summary disposition was granted, we find no error.

Plaintiff next argues that the trial court erred in dismissing his case for failure to comply with a discovery order. We disagree.

Dismissal for failure to comply with a discovery order is specifically permitted by MCR 2.313(B)(2)(c). "The trial court should carefully consider the circumstances of the case to determine whether a drastic sanction such as dismissing a claim is appropriate." *Bass v Combs*,

238 Mich App 16, 26; 604 NW2d 727 (1999). "Severe sanctions are generally appropriate only when a party flagrantly and wantonly refuses to facilitate discovery, not when the failure to comply with a discovery request is accidental or involuntary." *Id.* On appeal, discovery sanctions are reviewed for an abuse of discretion. *Dean v Tucker*, 182 Mich App 27, 32; 451 NW2d 571 (1990).

Plaintiff was allowed to amend his complaint to raise a claim of promissory estoppel, but he then failed to respond to defendants' discovery requests concerning that claim. In an order dated September 5, 2003, the trial court ordered plaintiff to respond to defendants' outstanding discovery requests by September 15, 2003. Plaintiff failed to comply with the court's order. Plaintiff's counsel subsequently filed an emergency motion to withdraw his appearance in which he averred, in part, that plaintiff was "aware of fact that discovery was outstanding, but failed to cooperate, stating 'I'm going to have to do what I have to do.'" After conducting a two-day hearing, the trial court issued an order on October 17, 2003, ordering plaintiff to comply with defendants' discovery requests by November 7, 2003. Plaintiff again failed to comply with the court's order. The trial court thereafter dismissed plaintiff's case in an order dated November 25, 2003. On this record, we conclude that the trial court did not abuse its discretion in dismissing plaintiff's complaint for failure to comply with the discovery order.

Finally, we reject plaintiff's unsupported allegation that dismissal was improper because he did not receive the trial court's October 17, 2003, order requiring him to comply by November 7. This issue was not raised in the trial court and, therefore, is not preserved for appeal. *City of Taylor v Detroit Edison Co*, 263 Mich App 551, 560; 689 NW2d 482 (2004). Further, the address reflected on the October 17, 2003, order is the same address to which a copy of the notice of presentment of order of dismissal was mailed to plaintiff on November 13, 2003. Plaintiff does not assert that he never received that order, and he did not contest entry of the order, from which he timely filed this appeal. Therefore, this issue is without merit.

Affirmed.

/s/ Hilda R. Gage
/s/ Mark J. Cavanagh
/s/ Richard Allen Griffin